

DEC 22 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 508

THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY, and AUSTIN LEVY.

—v.—

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Opinions Below

The denial of certiorari by the Supreme Court of Louisiana is reported at 250 La. 25, 193 So. 2d 530, and is set out at App. p. 64. The opinion of the Court of Appeal, Fourth Circuit, Parish of Orleans is reported at 192 So. 2d 193, and is set out at App. p. 61. The Civil Dis-

trict Court for the Parish of Orleans wrote no opinion; its decision is found in the judgment, dated January 31, 1966, set out at App. p. 47.

Jurisdiction

Appellant filed a notice of appeal to this Court in the District Court and the Court of Appeal on April 19, 1967. On June 6, 1967, Hon. R. T. McBride of the Louisiana Court of Appeal, Fourth Circuit, enlarged Appellant's time to file the Jurisdictional Statement and to docket the appeal to and including August 16, 1967. The Jurisdictional Statement was filed on August 16, 1967, and probable jurisdiction was noted on November 6, 1967. Jurisdiction on appeal is conferred by 28 U. S. C. §1257(2).

Statute Involved

Article 2315 of the Louisiana Civil Code:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted; or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such

spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."
(As amended Acts 1960, No. 30, §1.)

The Question Presented

Whether Louisiana Civil Code Article 2315, as construed and applied by the Supreme Court of Louisiana, is invalid under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution because it denies a right of action to illegitimate children for the wrongful death of their mother, on whom they were dependent, solely because of their status as persons of illegitimate birth.

Statement of the Case

Appellant brought this action under Article 2315 of the Louisiana Civil Code on behalf of the five minor children of the late Louise Levy for her wrongful death. The defendants were the State of Louisiana, through the Charity Hospital of New Orleans Board of Administrators and W. J. Wing, M.D., and the A.B.C. Insurance Companies, later designated as the Interstate Fire and Casualty Company (App. pp. 5, 27).

Article 2315 combines the two traditional forms of statutes dealing with recovery after the wrongful death of an individual. It authorizes recovery for the damage to certain classes of plaintiffs incurred as a result of the death. Appellant, on behalf of the minor children, requested different amounts of damages depending on the age of each child, the total sought being \$60,000. The statute also provides for the survival of any cause of action which the decedent had at the time of death. The children here, as a group, claim \$5,000 for the decedent's pain and suffering.

The Third Supplemental and Amending Petition, whose allegations (as well as the allegations of the other portions of the Petition) must be taken as true for the purposes of this appeal, stated that the five illegitimate children of Louise Levy lived with her, and she treated them as well as any mother would treat her legitimate children. She worked as a domestic servant to support them and either took them or had them taken to Mass every Sunday. In addition, she had them enrolled in a parochial school at her own expense, even though she could have sent them to the free public school (App. pp. 39-40).

As alleged in the Petition, on March 12, 1964, Louise Levy came to the Charity Hospital in New Orleans with

symptoms of tiredness, dizziness, weakness, chest pain and slowness of breath. Dr. Wing, to whom she was assigned, purportedly examined her, but he failed to take her blood pressure, make a proper check of her eyes or conduct any other test, such as urinalysis, which would have revealed her condition. He then sent the patient home with tonic and tranquilizers. She returned on March 19 with severe symptoms. Dr. Wing merely looked at her, told her that she was not taking the medicine, and made an appointment for her to see a psychiatrist on May 14. On March 22 she was brought to the hospital in a comatose condition, and at that time an adequate examination resulted in the correct diagnosis of her illness as hypertension uremia. She died on March 29, 1964 (App. p. 8).

The defendants, including Dr. Wing and the Interstate Fire and Casualty Company, moved to dismiss the petition on the grounds that petitioner had not qualified as tutrix, and that Article 2315 allowed no cause or right of action as to illegitimates (App. pp. 23-24). The procedural issue was cleared by appellant's qualification as tutrix in separate proceedings. The District Court then rendered judgment in favor of the defendants and the suit was dismissed¹ (App. pp. 47-48). On appeal, the Court of Appeal affirmed on the ground that illegitimate children have no cause of action for the wrongful death of their mother. The Court of Appeal specifically rejected appellant's claim that the denial of a cause of action under Article 2315 deprived the children of due process and equal protection under the

¹ The State of Louisiana was dismissed from the action and exceptions relating to the Charity Hospital were continued. No appeal was taken with respect to either of these parties. The judgment as to Dr. Wing and the Interstate Fire and Casualty Company was final in all respects.

Fourteenth Amendment (App. p. 62). Appellant petitioned the Supreme Court of Louisiana for a writ of certiorari on constitutional grounds. The Supreme Court denied the writ, finding "no error of law in the judgment of the Court of Appeal" (App. p. 64).

ARGUMENT

I.

Article 2315, as applied to deny illegitimate children the right to sue for the wrongful death of their mother, is invalid under the Equal Protection Clause of the Fourteenth Amendment.

A. The Governing Standards

This Court has employed two well established and related standards in determining questions under the Equal Protection Clause. The first looks to the characteristic or trait determining the classification and finds that some classifications are by their nature suspect, and may only be utilized if there "clearly appears . . . some overriding statutory purpose . . .," *McLaughlin v. Florida*, 379 U. S. 184, 192, or "compelling justification," *Oyama v. California*, 332 U. S. 633, 640; the second looks to the purpose of the statute and the basis of the classification and requires that the two be reasonably related.

The discrimination against the illegitimate children in this case is unconstitutional under both of these standards. Louisiana in Article 2315 in effect has created two classes of children—one that can sue for wrongful death and one that cannot. The classification, based on illegitimacy, is unrelated to the purpose of Article 2315 and is, moreover, by its nature a suspect criterion, the use of which

the State has utterly failed to justify.² The unreasonableness of the classification is accentuated by the fact that Louisiana is the only State that deprives illegitimate children of the right to sue for the wrongful death of their mother.³

In reference to the first standard, this Court has repeatedly affirmed that classifications based on race or ancestry are "constitutionally suspect," *Bolling v. Sharpe*, 347 U. S. 497, 499, and "subject . . . to the most rigid scrutiny," *Korematsu v. United States*, 323 U. S. 214, 216. According to BLACK'S LAW DICTIONARY (4th ed. 1951), illegitimacy is "The condition before the law or the social status, of a bastard; the state or condition of one whose parents were not intermarried at the time of his birth." (emphasis in original). It is obvious that a child's illegitimacy is like his race and ancestry and has nothing whatever to do with his own actions or conduct. As this Court said in *Hirabayashi v. United States*, 320 U. S. 81, 100, "Distinctions between citizens solely because of their ancestry are by

² The varied forms of discrimination against illegitimates that exist in virtually every State are coming under increasing attack. See, e.g., Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477 (1967); FOOTE, LEVY AND SANDER, CASES ON FAMILY LAW 72-73 (1966); Foster and Freed, Unequal Protection: Poverty and Family Law, 42 Ind. L. J. 192 (1967); Krause, Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy, 44 Tex. L. Rev. 829 (1966).

But the constitutionality of other forms of discriminatory legislation is not presented here; the instant case offers the most egregious example of invidious discrimination against illegitimates.

³ Despite some unsupported statements in secondary literature that other States deprive dependent illegitimate children of an equal right to sue for the wrongful death of their mother, Louisiana is in fact the only jurisdiction that does so, as far as we have been able to determine. Courts in Georgia and Maryland reached this result, but both cases have been overturned by statute. Ga. Code Ann. §105-1306; Md. Code Ann. Art. 67 §4. See Annotation, 72 A. L. R. 2d 1235, 1236-37 (1960).

their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Thus, attacks upon classifications based on illegitimacy "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs v. Cooper*, 336 U. S. 77, 95 (Frankfurter, J., concurring). There is no room for the State to claim that the discrimination here should be sustained if there is any "rational basis" to support it. Accordingly, there should be no constitutional distinction between discrimination based on illegitimacy and that based on race; discrimination against illegitimates also should be "constitutionally suspect."⁴ This is all the more true because statutes directed against illegitimates tend to fall most heavily on Negroes,⁵ as in this case, and in some

⁴ As stated by a leading writer on illegitimacy in discussing the appropriate constitutional test, "It would seem to be beyond question that a child's right to a familial relationship with his father is more akin to a 'fundamental right and liberty' or a 'basic civil right of man' than to a mere economic interest." Krause, *Equal Protection for the Illegitimate*, *supra* n. 2, at 488. If this is true of a child's relationship with his father, it is all the more obvious with respect to the relationship with his mother.

⁵ In Louisiana in 1964 a total of 9,567 illegitimate children were born. Of these 8,441 were Negro and 1,126 were white. The ratios of 1964 and other selected years were as follows:

<i>Ratios of Illegitimate Births per 1000 Live Births in Louisiana</i>			
	<i>Total</i>	<i>White</i>	<i>Non-White</i>
1950	78.8	12.4	175.1
1957	82.1	13.1	190.4
1964	111.2	21.7	245.5

Figures taken from: *Illegitimate Births: United States, 1938-1957*, Vital Statistics—Special Reports, Selected Studies, Vol. 47, No. 8, Sept. 30, 1960 (Department of H. E. W., Public Health Service, National Office of Vital Statistics), table 1, p. 249; Report of the Division of Public Health, p. 21, Louisiana State Board of Health (1964).

instances may have been designed to achieve this end. See W. BELL, *AID TO DEPENDENT CHILDREN*, 181-86 (1965).⁶

The second constitutional standard—a reasonable relationship between classification and purpose—was stated as early as 1896 in *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155:

“[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.”

⁶ In 1960 as part of a large anti-integration package passed at an emergency session of the legislature, N. Y. Times, Aug. 28, 1960, p. 62, col. 4, Louisiana instituted new measures to penalize illegitimate children and their parents. “Giving birth to two or more illegitimate children” was declared to be a crime as to both the father and the mother. LRS-R.S. 14:79.2 (1965).

Another statute provided that categorical assistance under the Social Security Act could not be given to a family if the mother had an illegitimate child after receiving assistance. La. Acts 1960, No. 306, §1. Under this “suitable home” plan 6,000 families with 22,500 children removed from public welfare. 95% of those affected were Negroes, although 66% of the welfare caseload a few months earlier was Negro. W. BELL, *AID TO DEPENDENT CHILDREN*, 183 (1965). Such “suitable home” requirements were prohibited in a major statement by Arthur J. Flemming, Secretary of the Department of Health, Education and Welfare. State Letter No. 452 (U. S. Bureau of Public Assistance), Jan. 17, 1961. Congress subsequently endorsed this interpretation of the Social Security Act. 42 U. S. C. 604(b), Title IV, §404(b).

Historically, the children of slaves were all deemed to be illegitimate. See H. CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* (1932). Marriages between whites or Indians and Negroes were long prohibited in Louisiana and the illegitimate children of miscegenous unions, like incestuous or adulterous illegitimates, could not be legitimated by subsequent marriage or by formal acknowledgment. *Hibbert v. Mudd*, 187 So. 2d 503 (La. App. 1966).

This standard has consistently been adhered to by the Court. As stated in *McLaughlin v. Florida*, 379 U. S. 184, 193, the question is "whether the classifications drawn in a statute are reasonable in light of its purpose" Or, as laid down in *Traux v. Raich*, 239 U. S. 33, 42, "reasonable classification implies action consistent with the legitimate interests of the State" See also *Carrington v. Rash*, 380 U. S. 89, 93.

While the Equal Protection Clause does not always require an exact correspondence between the purpose sought to be achieved and the class encompassed by the statute, here there is a complete lack of reasonable relation between the two. Judging Article 2315 in light of its purpose and the appropriate constitutional standard, it is plain that it is "arbitrary" and not a "reasonable classification" to deprive children of a cause of action for the negligent death of their mother on the sole ground that they are illegitimate.

B. The Claim for Wrongful Death

The purpose of wrongful death statutes, deriving from Lord Campbell's Act, 9 & 10 Vict. Ch. 93 (1846), is to reimburse those who stand to lose through the death of another, usually a close relative, whether through contributions based on past earnings or through loss of services, training, nurture, education and guidance. See S. SPEISER, *RECOVERY FOR WRONGFUL DEATH*, iii-iv, 12-13 (1967). In ruling that illegitimate children could sue under the Federal Death Act, the Court of Appeals for the Second Circuit said:

"The purpose and object of the statute is to continue the support of dependents after a casualty. To hold that these children or the parents do not come within

the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent."

Middleton v. Luckenbach S.S. Co., 70 F. 2d 326, 329-30 (1934), quoted in *DeSylva v. Ballentine*, 351 U. S. 570, 583-84 (Douglas, J., concurring). Consistently with this policy, the children in the present case would not be denied recovery under other federal statutes because of their illegitimacy.⁷

Louisiana's wrongful death statute was an "adoption" of Lord Campbell's Act, *Cooper v. Blanck*, 39 So. 2d 352, 359 (La. App. 1923), and its traditional compensatory purpose was early set forth by the Supreme Court of Louisiana:

"the object of this law was to save [children] harmless during their minority from the loss of benefits (ma-

⁷ Both the Veterans Administration Act, 38 U. S. C. §101 (1964) and Social Security Act, 42 U. S. C. §§301 *et seq.* allow illegitimates to recover when there is satisfactory proof of paternity. Under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1427 (1927), 33 U. S. C. §§901-950 (1964), recovery is allowed by illegitimate children who are acknowledged by and dependent upon the deceased. Cases under the Jones Act, 38 Stat. 1185 (1910), as amended, 46 U. S. C. §688 (1964), also hold as a matter of federal law that the term "children" includes illegitimates. *Civil v. Waterman S.S. Corp.*, 217 F. 2d 94 (2d Cir. 1954). The Federal Employees' Liability Act, 35 Stat. 65 (1908), as amended, 5 U. S. C. §2093 (1964), the Copyright Act, 17 U. S. C. §24 (1964), and the Federal Employees' Group Life Insurance Act, 68 Stat. 738 (1954), as amended, 5 U. S. C. §2093 (1964), all incorporate state law of inheritance and in this case the children would be allowed to recover through their mother. L.S.A.-C.C. Article 918. See generally Note, The Rights of Illegitimates Under Federal Statutes, 76 Harv. L. Rev. 337 (1962).

terial and moral) which they would have received had their father lived up to the time of their respective majorities." *Eichorn v. New Orleans & C. R. Light & P. Co.*, 114 La. 712, 724, 38 So. 526, 530 (1904).

The purposes of death statutes in general, and of Louisiana's in particular, are wholly consistent with the claim of the children here. They were as close to their mother as any children born in wedlock could be. They were fully dependent on her for the necessities of life, as well as the vital intangibles of training, nurture, and guidance. And they are now losing as much as—indeed, because of the absence of a father, probably more than—legitimate children would lose in comparable circumstances. To lose sight of these facts is not only to ignore the object of actions for wrongful death, but to treat these illegitimate children as "constitutional nonpersons," devoid of the equal protection of the laws. See Fortas, *Equal Rights—For Whom?*, 42 N. Y. U. L. Rev. 401, 408 (1967); see also Note, 30 Yale L. J. 167 (1920) (sharply critical of early case holding that illegitimate children could not recover for wrongful death of their parent).

The unreasonableness of the classification here in light of the statutory purpose becomes even plainer when it is recognized that in Louisiana both parents are under a legal duty to support their illegitimate children. LRS-C.C. Article 240. Article 239 of the Civil Code provides the rationale for this rule: "[N]ature and humanity establish certain reciprocal duties between fathers and mothers and their illegitimate children" In this context of a state policy requiring parents to support their out-of-wedlock children, it is surely bizarre to deny them a cause of action

against a wrongdoer who caused the death of their mother, on whom they were dependent.⁸

The invalid application of Article 2315 is pointed up further by a recent decision of a three-judge District Court of the Middle District of Alabama. In *Smith v. King* (Civ. No. 2495-N, Nov. 8, 1967), the court invalidated the "substitute father" regulation of the Alabama Department of Pensions and Security, under which public assistance payments known as Aid to Families with Dependent Children were to be terminated if a man lived out of wedlock in their home or had sexual relations with their mother. The District Court held this a denial of the equal protection of the laws because under the Alabama regulation financial assistance is

"denied for an arbitrary reason—the alleged sexual" behavior of the mother; such a reason is wholly unrelated to any purpose of the Aid to Dependent Children statutes The punishment under the regulation is against needy children, not against the participants in the conduct condemned by the regulation." Mimeo-graph opinion, pp. 10-11.

The *Smith* case is directly in point here because in both cases, for reasons "wholly unrelated" to the purpose of state legislation, benefits under the statutes have been denied on

⁸The arbitrary nature of the classification here is further accentuated by the fact that Article 2315 provides that *adopted* children may recover for the death of their parents, and because Louisiana courts even allow employers to recover from a wrongdoer workmen's compensation payments that they make to the deceased's illegitimate children. *Board of Com'rs v. City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1953); *Thomas v. Matthews Lumber Co. of Mansfield, Inc.*, 201 So. 2d 357 (La. App. 1967).

the ground of illegitimacy.⁹ The present case is a much stronger instance of a denial of equal protection of the laws than the *Smith* case because there not only the illegitimate children were denied benefits, but the entire family—including the mother who was “responsible” for the illegitimacy—while here only the illegitimate children are being denied the right to sue. Moreover, in *Smith* there was not the additional inequity, present here, that denial of recovery permits a wrongdoer to escape any consequences for his act.

The arbitrary character of the ruling below is clarified by its attempted justification in the Louisiana courts. The Supreme Court of Louisiana wrote no opinion, and the sole justification given by the Court of Appeal for interpreting Article 2315 to discriminate against illegitimates was that “it discourages bringing children into the world out of wedlock.” App. p. 62. But the Court cited no evidence to support the reasonableness of this means of controlling illegitimate births.

Moreover, the attempted justification of the Louisiana court is offensive to common sense. It would be truly remarkable if persons contemplating or in the process of producing a child out-of-wedlock would be deterred by the possibility that the child would not be able to recover for their wrongful death. Surely, such a fanciful assertion, which is at the root of the decisions below, will not suffice to justify the denial of rights conferred by Article 2315 to children who have lost their mother through another’s wrongful conduct.

⁹ In an analogous area, two courts have recently held that the denial to a wife of the right to sue for loss of consortium of her husband, when the husband may sue for loss of the consortium of his wife, violates the wife’s right to equal protection of the laws. See *Owens v. Illinois Baking Corp.*, 260 F. Supp. 820 (W. D. Mich. 1966); *Clem v. Brown*, 207 N. E. 2d 398 (Ohio Ct. of Common Pleas, 1965).

Nor can Louisiana carry its heavy burden of proof by relying on other possible reasons for discriminating against illegitimate children. One argument, sometimes relied on to justify the exercise of state police power in this general area, is the asserted right of a State to regulate sexual activity, and specifically to discourage promiscuity. But as with illegitimacy, neither common sense nor practical experience supports the assumption that discrimination against illegitimate children under Article 2315 will deter illicit sexual activity.

Another possible argument would rely on the promotion of family unity. This policy is usually asserted to protect the interests of a parent's legitimate children against the claims of the illegitimate ones. See Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477, 493 (1967). But in this case there are no legitimate children who stand to lose. Moreover, there is every reason to believe that "family unity" will be harmed rather than aided by disqualifying the illegitimate children here from maintaining an action to recover for the wrongful death of their mother. If the children do not recover in this action, they are likely to be split up in different homes or sent to an orphanage, with disastrous consequences for "family unity." If they do receive some money, it is at least possible that arrangements could be made to provide a home for all of them with an aunt, other relative or friend.

In sum, there is no substantial basis on which the decision below can be justified. This fact would be sufficient to invalidate the present application of Article 2315 wherever the burden of proof lies. Under the appropriate standard, which requires the State to demonstrate some "compelling justification" for this discrimination against the illegitimate

children, *Oyama v. California, supra*, unconstitutionality is the only possible conclusion.

C. The Survivorship Claim

In addition to authorizing a claim for wrongful death, Article 2315 makes the right to recover damages caused by "an offense or quasi-offense" survive the death of the injured person for one year in favor of certain classes of persons, including the deceased's "child or children." The Louisiana courts also rejected the plaintiff's claim based on survivorship because the children were illegitimate.

As in the case of the claim for wrongful death, there is no valid basis for this result. This aspect of the discrimination against the illegitimate children also must be tested by whether it is reasonably related to the purpose of the statute, bearing in mind that the "suspect" characteristic determining the classification requires the State to demonstrate "some overriding statutory purpose . . . " to justify its action. *McLaughlin v. Florida, supra*, 379 U. S. at 190-92.

A central purpose of the survivorship portion of Article 2315 is to reinforce the deterrent aspects of the general tort law by refusing to permit a wrongdoer to escape payment of damages through the death of his victim. This purpose is expressed in the introductory sentence of the Article, which provides that "Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it," and it is explained in Note, 14 Tulane L. Rev. 612, 619 (1940), where it is said: "[T]he idea apparently evolved that the person responsible for the wrongful act should pay damages to someone connected with the deceased, whether or not that person was dependent on him."

This Louisiana policy is reflected in the cases that require a wrongdoer to pay damages to the employer of the deceased, even though the employer is not mentioned in Article 2315, to compensate him for payments made to the deceased's illegitimate children. *Board of Com'rs v. City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1953); *Thomas v. Matthews Lumber Co. of Mansfield, Inc.*, 201 So. 2d 357 (La. App. 1967).

It is obvious that to deny illegitimate children the right to recover on their survivorship claim when legitimate children could recover is inconsistent with the express purpose of Article 2315. There is no reason why they should not be allowed to call to account the "person responsible" for their mother's death equally with legitimate children. Moreover, as with the wrongful death claim, there is no support of either a factual or common sense nature for the conclusion that individuals will be deterred from having illegitimate children or from engaging in illicit sexual activity by a law barring illegitimates from recovering by way of survivorship for damages incurred by the deceased before he died.

The only argument that might be made here that has not already been answered in connection with wrongful death is that to permit recovery could prejudice the claim of any legitimate children. This argument would be based on the fact that the total amount of the survivorship claim—the pain and suffering of the deceased, valued at \$5,000 in the complaint—is fixed and would not depend on the number of children.

But this contention—which the Louisiana courts did not rely on below—is without real substance. In the first place, there are no legitimate children involved in this case.

Second, if there were legitimate children, this argument would be questionable even with respect to a survivorship claim from a *father* of illegitimate children who has acknowledged the children. As of 1960, in 21 States illegitimates could inherit from their father. See Note, Illegitimacy, 26 Brooklyn L. Rev. 45, 76-79 (1959), and it has been persuasively argued that this result is constitutionally required. See Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev., *supra*, at 495-502. Whatever the result with regard to fathers, the argument against recovery is without any force whatever as to mothers of illegitimate children, with whom, as in this case, they will usually have a more intimate relationship. Finally, while there may be an issue of proof of paternity in some cases, see Foote, Levy & Sander, Cases and Materials on Family Law 61-65 (1966), this difficulty is wholly absent in connection with maternity, where public records are invariably available.

Recognizing these considerations, 48 States and the District of Columbia have accorded illegitimates equal inheritance rights from their mothers. See Note, Illegitimacy, 26 Brooklyn L. Rev., *supra*, at 76-79 (New York and Louisiana the only exceptions). Even Louisiana has gone so far as to permit illegitimates to inherit from their mother if they are acknowledged (however informally) and there are no legitimate children. Louisiana Civil Code Article 918. *Allen v. Anderson*, 55 So. 2d 596 (La. App. 1951); *Succession of Tyson*, 186 La. 516, 172 So. 772 (1937). This situation further emphasizes the irrational nature of the discrimination here because, under Louisiana law, if the deceased mother of the children had collected damages for pain and suffering from the wrongdoer before her death, the illegitimate children would have lawfully inherited this money.

In this light, it is plain that the refusal of the courts below to permit recovery of the survivorship claim is not grounded in any reasonable relationship between illegitimacy and the purpose of Article 2315, but is rather an arbitrary and invidious classification and therefore invalid under the Equal Protection Clause.

II.

The discrimination imposed against the illegitimate children in this case violates the Due Process Clause of the Fourteenth Amendment because it furthers no valid state purpose and it deprives them of rights on the basis of status over which they have no control.

We have already shown in Point I that the relationship between discrimination against illegitimates and any proper state purpose is baseless, and that Louisiana has violated the Equal Protection Clause by discriminating against illegitimate children under Article 2315. There is also a violation of due process because the State has arbitrarily barred certain children from suing for their mother's wrongful death and state imposition of disabilities "on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause." *Schware v. Bd. of Bar Examiners*, 353 U. S. 232, 249 (Frankfurter, J., concurring).¹⁰

¹⁰ While "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought," *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488, Article 2315 is not such a law, but is rather akin to statutes involving an aspect of personal liberty. As to such statutes, the Court has required a showing under the Due Process Clause that some

Furthermore, the decision below is violative of the children's due process rights because it denies them rights on the basis of a condition of birth and a status over which they had no control and which they are powerless to correct. This Court has recognized in several contexts that it is impermissible to hold an individual responsible for his status or conduct over which he has no control.¹¹ *Robinson v. California*, 370 U. S. 660, involved a California statute making it a misdemeanor for any person to "be addicted to the use of narcotics." The Court ruled that the "status" of narcotics addiction is "an illness which may be contracted innocently or involuntarily," and that therefore any punishment for the condition is invalid as "cruel and unusual" under the Eighth and Fourteenth Amendments. Or, as Justice Harlan said in his concurring opinion, to subject an individual to criminal penalty for a condition which he could not control is an "arbitrary imposition" by the State. 370 U. S. at 679. See also *Driver v. Hinnant*, 356 F. 2d 761 (4th Cir. 1966) ("chronic alcoholism" a disease not punishable as a crime).

A recent article, after discussing the many scholarly reviews of the *Robinson* opinion, concludes that, "Even the narrowest of these interpretations [supports] the notion

proper state purpose is being pursued through reasonable means. See, e.g., *Meyer v. Nebraska*, 262 U. S. 390; *Pierce v. Society of Sisters*, 268 U. S. 510; *Griswold v. Connecticut*, 381 U. S. 479; *Poe v. Ullman*, 367 U. S. 497, 543 (Harlan, J., dissenting). This requirement is consistent with the Court's statement in *Bolling v. Sharpe*, *supra*, 347 U. S. at 499, that "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . ."

¹¹ A leading legal philosopher, Professor Lon Fuller, maintains that a rule which an individual has no opportunity to obey is not a law at all but an arbitrary application of governmental force. L. FULLER, *THE MORALITY OF LAW*, 39, 70-73 (1964).

that punishing a status involuntarily entered into and which cannot voluntarily be abandoned is unconstitutional." Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205 (1967). This precisely describes the status of the children here, who neither control nor can correct their condition of illegitimacy.¹²

NAACP v. Overstreet, 384 U. S. 118, is also on point. In this case the Court dismissed as improvidently granted a petition for certiorari which earlier had been granted, limited to the question whether the lower court, by holding the NAACP liable "for acts performed without its knowledge and by persons beyond its control," denied it rights secured by the Fourteenth Amendment. 382 U. S. 937. Although a majority of the Court voted to dismiss the petition, thereby expressing no opinion on the merits, four Justices through an opinion of Justice Douglas concluded that it violated the Fourteenth Amendment to hold the NAACP liable for acts over which it had no control. *Id.*, 384 U. S. at 123-26.

Oyama v. California, *supra*, brings us even closer to the instant case. There the Court struck down California's Alien Land Law that inflicted harm on a child due to the status of his father. In holding that extraordinary procedural burdens could not be imposed on a citizen in proving the ownership of land merely because his father was an

¹² See also the recent decision of the New York Court of Appeals holding that a vagrancy statute violates due process because it penalizes "a condition, such as one resulting from illness, over which an individual had no control." *Fenster v. Leary*, 20 N. Y. 2d 309, 314, — N. E. 2d — (1967). Two other courts have reached the same result. *Baker v. Bindner*, C. A. No. 5648, W. D. Ky., Oct. 13, 1967; *Alegata v. Commonwealth*, 36 U. S. L. W. 2324 (Mass. Sup. Jud. Ct., Nov. —, 1967).

alien ineligible for citizenship, the Court reiterated that distinctions based on ancestry are "by their very nature odious to a free people." *Id.*, 332 U. S. at 646.

The unreasonableness of imposing burdens upon children because of the actions of their parents is exemplified by an explicit constitutional policy. Article III, Section 3, Cl. 2 of the Constitution provides that "The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." While this provision applies in terms only to cases of treason (which had largely occasioned the historic use of corruption of blood in England), it manifests a broader principle of justice—that individuals should not be denied rights because of the behavior of their ancestors which they could not control.¹³ In fact, what Louisiana has done here is similar to the medieval form of punishment by which a "felon's blood was attainted or corrupted" with the result that he could not own property himself, "nor could any heir born before or after the felony claim through him." W. S. HOLDSWORTH, 3 HISTORY OF ENGLISH LAW 69. Indeed, if corruption of blood is explicitly forbidden by the Constitution with respect to the heinous crime of treason, it certainly should not be permitted in lesser contexts. In this connection, see 18 U. S. C. §3563 (1948), which provides generally that "no conviction or judgment shall work corruption of blood or forfeiture".

In sum, as the only State that sanctions the cruel result of the ruling below, Louisiana not only has acted unreasonably in light of the purpose of Article 2315, but it has denied

¹³ The Louisiana statute also contravenes the biblical injunction that "The son shall not bear the iniquity of the father." Ezekiel 18:20.

rights to blameless individuals for the acts of others without any factual or other adequate justification and it has flouted some of the most conspicuous decisions of this Court holding that a State cannot harm individuals on the basis of their ancestry. Such action by Louisiana is obviously arbitrary and therefore inconsistent with the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Louisiana should be reversed.

Respectfully submitted,

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